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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 860

RUSSELL MORTON BROWN, *Petitioner.*

v.

EDWARD OLIVER LAMB AND DISPATCH INC., a PENNSYLVANIA CORPORATION, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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EDWARD OLIVER LAMB AND DISPATCH INC., a PENNSYLVANIA CORPORATION, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in this case on July 17, 1969. That judgment affirmed an order of the United States District Court for the District of Columbia, setting aside a jury verdict for petitioner and rendering judgment n.o.v. for respondent.

OPINION BELOW

The opinion of the Court of Appeals is reported at 414 F.2d 1210. It is reproduced in the Appendix hereto, p. 1a. The order of the District Court is not reported. It is set forth in the Joint Appendix, p. 16, and in the Appendix to this Brief, p. 25a.

JURISDICTION

Judgment was entered by the Court of Appeals for the District of Columbia on July 17, 1969. The jurisdiction of this Court is invoked under Title 28, U.S. Code, § 1254 (1) and § 2101(c). Under date of October 4, 1969, the Chief Justice enlarged the time for filing this application to and including November 17, 1969.

QUESTIONS PRESENTED

1. Is a Court of Appeals authorized to reweigh the evidence *sua sponte*, and set aside the jury verdict because the appellate court feels another conclusion is more reasonable?

2. In *Burnett* v. *New York Central R. Co.*, 380 U.S. 424, 428 (1965), holding an action may be considered "commenced" for limitation purposes by filing suit, even in the wrong court, did this Court set forth a general rule of law, or a special one limited to FELA cases?

CONSTITUTIONAL PROVISION, STATUTE, AND RULE INVOLVED

7th Amendment, U.S. Constitution:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried

by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

District of Columbia Code, Sec. 28-3504 (1967):

In an action upon a simple contract, an acknowledgment or promise by words only is not sufficient evidence of a new or continuing contract whereby to take the case out of the operation of the statute of limitations or to deprive a party of the benefit thereof unless the acknowledgment or promise is in writing, signed by the party chargeable thereby. * * *

Federal Rules of Civil Procedure, Rule 50(b)

This is reproduced in the Appendix to this brief, p. 32a.

STATEMENT OF THE CASE

In May, 1963, petitioner attorney filed suit in the District of Columbia for legal fees earned over a period of three years, 1954 through mid-1957. These services related to proceedings before the Federal Communications Commission, which resulted in a renweal of the broadcast license of respondent corporation, in which respondent Lamb was the controlling stockholder (JA. 3).

Among other defenses, respondents pleaded limitations, relying upon the local 3-year statute of limitations. Twice respondents moved for summary judgment on this ground (JA 13, 14); twice petitioner by affidavit claimed the delay was expressly requested by respondents, who should therefore be estopped to plead limitations. Twice the District Court denied the motions, holding there was an issue of fact (JA 13, 15).

Upon trial of the case jury verdicts totalling $400,000. were returned for plaintiff under instructions which required a finding of estoppel as a condition precedent to any award to plaintiff. Thereafter, the trial judge granted defendants' motion for judgment *non obstante veredicto,* holding that the bar of limitations had not been overcome because there was no writing as required by D. C. Code, Title 28, § 3504.

On appeal, the Court of Appeals affirmed. While that Court recognized the error in requiring a written instrument (414 F.2d 1212, n. 4), it undertook an independent review of the evidence and concluded the jury's finding of estoppel was unsound. What the jury had found as a fact, and what neither party had specifically questioned, the Court of Appeals denounced by holding that, "No person, especially a lawyer, such as appellant here, could reasonably rely on the representations allegedly made by or on behalf of appellees." Accordingly, while it recognized the error below, the Court of Appeals found new ground for affirmance of the judgment, holding plaintiff now barred by limitations.

Petitioner had claimed an earlier Ohio suit, still pending, tolled the District of Columbia statute under this Court's decision in *Burnett* v. *New York Central R. Co.,* 380 U.S. 424, 428 (1965), and related decisions. The Court of Appeals declined to follow this rule on the ground, among others, that it applies only to FELA cases.

REASONS FOR GRANTING THE WRIT

I. DIRECT CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT ARISES FROM THE COURT OF APPEALS DECISION ASSERTING AND EXERCISING THE RIGHT TO REWEIGH THE EVIDENCE AND REJECT THE JURY VERDICT, IN VIOLATION OF THE SEVENTH AMENDMENT.

The Court of Appeals was asked to consider two specific questions:

first, whether equitable estoppel would prevent a defendant from pleading the statute of limitations, where he had himself induced the delay by words or conduct, in the absence of a written instrument; and *second,* whether the trial court is authorized to set aside the verdict as excessive where it is adequately supported by evidence.[1]

As to the first question, the Court of Appeals held, as appellant contended, that the District Court erred: estoppel may bar a plea of limitations independently of a written instrument. Without more, this should have required reversal and reinstatement of the jury verdict.

But the Court of Appeals embarked on its own, raising for the first time a point which had never been contested in the trial court, and which was not presented on appeal. It reversed the jury verdict, holding, *per curiam,* there could be no estoppel because there was no reliance; by review of the evidence *de novo,*

---

[1] At the time of appellate argument the Court instructed appellant's counsel to discuss only the first point. Since the decision disposed of the case on that basis, the second point was not reached and is not here involved. It is believed to be academic now, since the decision in *Taylor* v. *Washington Terminal,* 409 F.2d 145 (D.C. Cir. Feb. 20, 1969), would seem to require reversal and reinstatement of the jury verdict because the amount of the verdict was clearly within the range of the evidence.

it rejected the jury finding on credibility. The Court said (414 F.2d 1210 at 1212, n. 4):

> "* * * *our own review of the evidence* for this purpose establishes its inadequacy to impose an estoppel. No person, especially a lawyer such as appellant here, could reasonably rely on the representations allegedly made by or on behalf of appellees" (emphasis supplied).

Superb comment on this is provided by borrowing the language of this Court in reversing the Third Circuit in a similar situation:

> "We might agree with the Court of Appeals had the question of fact been left to us. But neither we nor the (p. 359) Court of Appeals can redetermine facts found by the jury, any more than the District Court can predetermine them." *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.*, 369 U.S. 355, 358 (1962).

This Court promptly vindicated that decision and reversed the Second Circuit, which had set aside a jury verdict and held plaintiff's action was not reasonable as a matter of law. *International Terminal Operating Co., Inc.* v. *Nederl. Amerik.*, 393 U.S. 74, 75 (1968). In language on all fours with the case at bar, the issue of reasonable action was held to be not open to appellate review. Citing the *Ellerman Case*, this Court said (p. 75):

> "Under the Seventh Amendment, that issue (reasonableness) should have been left to the jury's determination."

Clearly, the decision below is in direct conflict.

Petitioner had testified at length (JA 56-62, App. 5a) that he had delayed filing suit in the District of Columbia at the express request of respondent Edward

Lamb, who stressed his need for time to rehabilitate his finances, and the damage which such a suit would do to his affairs. He had promised an amicable settlement in return for petitioner's forebearance to sue in the District of Columbia.

A prior action filed in Ohio, and still pending, had remained inactive, as requested by Lamb through his representative, J. Howard McGrath (App. 9a). Petitioner testified the Ohio suit was impeded by the fact that his witnesses who knew most about his case were in the District of Columbia—J. Howard McGrath, Mr. Jim McInerney, and the people at the FCC; so were the voluminous records and exhibits of the proceedings in the custody of the Commission in Washington.

Petitioner testified that before the statute of limitations expired, when he proposed to file suit in the District of Columbia, he delayed at the request of respondent and his attorney, J. Howard McGrath (JA 58-59, App. 7a, 8a). He quoted Lamb's request (JA 56):

> (Tr. 844) " * * * he didn't want any more lawsuits, especially he didn't feel he could stand the publicity because he was engaged in the struggle for the control of the Seiberling Rubber Company and that was listed on the New York Stock Exchange, and he said: 'If you will just withhold your action, please,' he said, 'I will get straight with you'.
>
> "He said: 'You know, Howard has always been my lawyer and you and Howard are in touch. I will work it out with you through Howard and I will be very reasonable with you.
>
> " 'But I don't want any more lawsuits (Tr. 845) now and I have to ask you please, don't bring a suit in the District of Columbia especially.'

> (Tr. 849) (JA 59) "I then talked with Howard McGrath and he assured me that he had absolute confidence in Mr. Lamb's sincerity, and he said that Mr. Lamb had always been extravagantly lavish in his praise of the work I had done for him, and that he was certainly eager to pay me but he just needed (Tr. 850) time, so I agreed to delay the filing of the lawsuit on that basis."

An identical request by J. Howard McGrath as Mr. Lamb's representative was recounted by Mrs. Sunne Miller of Toledo, Ohio (JA 45-46, App. 10a), manager of respondent Lamb's radio station WTOD in Toledo at the time of the FCC hearings, and an active participant therein. (JA 45-46, App. 14a-15a).

Petitioner contended that since respondent Lamb had himself requested the delay, under familiar principles he was estopped to plead limitations.

In defense, respondent rested on the District of Columbia statute, § 28-3504, claiming that such estoppel cannot arise in the absence of a written agreement. By motions for directed verdict at the close of plaintiff's case, and before submission of the matter to the jury, defendants asked decision on that specific basis (App. 15a, 22a). Both such motions were denied.

In submitting the estoppel issue to the jury, the trial judge made no reference to necessity for a writing (App. 28a), and no such instruction was requested. The court said (App. 29a):

> Now the jury must search the evidence in this case to see whether it reflects the presence or absence of any such affirmative inducement (to delay) offered to Mr. Brown by Mr. Lamb, and whether Mr. Brown acted on it to his prejudice, if there was such an affirmative inducement.
>
> * * *

> (App. 32a) If the jury should find Mr. Brown has failed to successfully carry his burden of proof as to the Statute of Limitations, then your verdict would be for the defendants. That would end the case and you would not need to consider anything further.

As a matter of procedure the jury was told to consider limitations first, and find for the defendants if the statute should be found applicable.

> (Tr. 1311) "On the contrary, if you find that the Statute of Limitations does not apply, or that a defendant is estopped from asserting it, then you would take up for consideration (Tr. 1312) Mr. Brown's claim for service.

Respondents' counsel expressly stated they had "no objection to the charge" (Tr. 1332).

The jury returned a verdict in favor of petitioner, and that is the verdict set aside by the trial court which entered judgment for the defendant n.o.v. That action by the trial judge is expressly based upon the D.C. Code § 28-3504 (1967) which requires a new promise or acknowledgment to be in writing if it is to avoid the statute of limitations (JA 16, App. 25a). In this respect the Court of Appeals held the District Court erred (App. 1a at 4a).

In proceeding to reweigh the evidence and conclude the jury was in error, the Court of Appeals establishes a new rule for the District of Columbia—a rule which eviscerates the Seventh Amendment, and leaves out of account this Court's oft-repeated caution that the right to trial by jury will be jealously guarded.

Without objection, the trial judge instructed the jury correctly (App. 30a):

> "If Mr. Lamb said what Mr. Brown says Mr. Lamb said, then did Mr. Brown rely on it? That is a question for you."

The jury found petitioner did so rely.

The Court of Appeals holds this verdict was wrong because such reliance was unreasonable.

It is notable that this question was not raised at the trial, and was neither briefed nor argued by either side on appeal; it was injected into the case for the first time, and without notice, by the Court of Appeals.

Rule 50(b) of the Federal Rules of Civil Procedure (App. 32a) contemplates that the trial court reserves the ruling on a motion for directed verdict, and may later grant a motion for judgment notwithstanding the verdict, "in accordance with his motion for a directed verdict."

It is thoroughly settled, however, that the motion for judgment notwithstanding the verdict cannot raise new grounds not urged in the prior motion for directed verdict. *Ralston Purina Co.* v. *Parsons Feed and Farm Supply, Inc.,* 364 F.2d 57, 60 (8th Cir. 1966); *United States* v. *Fenix and Scisson, Inc.,* 360 F.2d 260, 265 (10th Cir. 1966), *cert. denied* 386 U.S. 1036 (1966); *Glazer* v. *Glazer,* 374 F.2d 390, 400 (5th Cir. 1967), *cert. denied* 389 U.S. 831 (1967).

When respondent moved for directed verdict, the sole ground urged upon the court was the absence of a writing to overcome the statute of limitations as required by D.C. Code § 28-3504. This was presented orally at the close of plaintiff's case and again before

submission to the jury. It will be plainly noted that petitioner's counsel, the late George E. C. Hayes, Jr., a distinguished member of the bar of this Court, argued at length the equities of estoppel and inapplicable scope of the D.C. Code section (App. 18a et seq.). Just as clear is the position of respondent that a writing was required, concurred in by the trial judge's statement to Attorney Hayes:

> (App. 21a) Mr. Hayes: But fundamentally, if Your Honor please, the point is whether he had done anything to induce him not to go forward in his suit, and there was reference to the Cassell suit—
>
> The Court: Well, I think you are going to have to have something in writing.
>
> Mr. Hayes: Well, the cases don't say that, if the Court please.
>
> The Court: I think the law says that.
>
> * * *
>
> (Tr. A-28) (Mr. Hayes) * * * And it doesn't say anything in writing, so—
>
> The Court: No, the statute says about writing, Mr. Hayes.
>
> Mr. Hayes: Yes, but if Your Honor please, this is an interpretation of what can be done, and the statute provides that—
>
> The Court: The wording of the statute is very clear.
>
> * * *
>
> (App. 22a) Mr. Baker: So that I say to Your Honor that because there is no compliance with the statute as to anything in writing which would take the case out of the statute, I respectfully submit to Your Honor that there should be a directed verdict in favor of these defendants at this time * * *.

Later, when all the evidence had been completed, the motion was renewed. The trial judge's colloquy with Attorney Hayes reflects her view of the law: "However, I don't find any case that doesn't have some 'writing' where they talk about estoppel." (App. 23a).

When respondents moved for judgment n.o.v. (App. 24a), they were limited as a matter of law by the matters raised in the motion for directed verdict.

That was the basis for the judgment of the trial court notwithstanding the verdict—that the statute requires a writing (App. 25a). She expressly cited that D.C. Code provision as authority for the decision (App. 26a), and flatly stated her opinion that the Court of Appeals decisions discussed by Attorney Hayes all required a writing (App. 23a).

In that, said the Court of Appeals, she erred (App. 1a at 4a)—

but the judgment nullifying the verdict must stand, said the Court, because—

the jury verdict was unsound—

the Court of Appeals thought it was unreasonable—

petitioner's reliance on respondent was not reasonable:

> (414 F.2d 1210, 1212, n. 4, App. 4a) "No person, especially a lawyer such as appellant here, *could reasonably rely* on the representations made by or on behalf of appellees." (Italics supplied).

The jury verdict established that petitioner did so rely, and no warrant of law or constitutional principle is known by which any court is authorized thus summarily to deprive a party of the right to this verdict

under the Seventh Amendment—to substitute its conclusion for that of the twelve jurors.

Rule 50, authorizing the reserved ruling on the motion for directed verdict, did not change the demarcation which separates the court's authority over the law from the jury's control of the facts. Such a suggestion was expressly rejected by this Court in *Berry* v. *United States,* 312 U.S. 450, 453 (1941), where it was said:

> "But that rule (Rule 50) has not taken away from juries and given to judges any part of the exclusive power of juries to weigh evidence and determine contested issues of fact—a jury being the constitutional tribunal provided for trying facts in courts of law."

In a nutshell, no appellate court may substitute its judgment for the verdict of a jury. *Dennis* v. *Denver & Rio Grande Western R. Co.,* 375 U.S. 208, 210 (1963). Credibility of witnesses and the weight to be given their testimony are questions addressed exclusively to the jury, who may believe or not, accept or discard. *Lavender* v. *Kurn,* 327 U.S. 645, 653 (1946); *Sartor* v. *Arkansas Natural Gas Corp.,* 321 U.S. 620, 628 (1944); *Sentilles* v. *Inter-Caribbean Shipping Corp.,* 361 U.S. 107, 110 (1959).

Much quoted is the trenchant language of this Court in *Tennant* v. *Peoria & Pekin U. R. Co.,* 321 U.S. 29, 32; 35 (1944):

> (p. 35) "Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or *because judges feel that other results are more reasonable.*"

In accordance with familiar rules the Court said (p. 32):

> "The essential requirement is that mere speculation be not allowed to do duty for probative facts after making due allowance for *all reasonably* (33) *possible inferences favoring the party whose case is attacked* (citations omitted).
>
> "If that requirement is met, as we believe it was in this case, the issues may properly be presented to the jury. *No court is then justified in substituting its conclusions for those of the 12 jurors*" (emphasis supplied).

In that case the Court reversed an appellate court order for judgment n.o.v.

This Court has protected the vitality and integrity of the jury system at every challenge. Thus, in *Byrd* v. *Blue Ridge Rural Electric Co-op.*, 356 U.S. 525, 537 (1958), Justice Brennan said of the federal courts:

> (p. 537) "An essential characteristic of the system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury, and under the influence—if not the command—of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury."

Such is the unvarying pattern in which this Court "has always guarded with jealousy" the right to jury trial. *Baylis* v. *Travelers' Insurance Co.*, 113 U.S. 316, 321 (1885); *Jacob* v. *City of New York*, 315 U.S. 752 (1942). *Parsons* v. *Bedford*, 3 Pet. 433, 446-7 (1830), contains a wellknown and moving discussion of the constitutional importance of jury trial in the learned style of Mr. Justice Story, eloquently voicing principles which are warp and woof of our legal system.

Speaking of the Seventh Amendment and the clause here under discussion, Justice Story said:

> (p. 447) "This is a prohibition to the courts of the United States to re-examine any facts tried by a jury in any other manner."

From this principle the decision below has severed all relation.

(a) The Decision Below Conflicts With Every Other Circuit.

Every Court of Appeals has categorically ruled that it will not reweigh the evidence, try issues of fact *de novo*, or otherwise intrude upon the jury function of passing upon the weight of evidence, or credibility of witnesses.

(1st Cir. 1956) *Carter* v. *Schooner Pilgrim, Inc.*, 238 F.2d 702, 705;

(2nd Cir. 1964) *Masuda* v. *Kawasaki Dockyard Co.*, 328 F.2d 662, 664;

(3rd Cir. 1960) *Lind* v. *Schenley Industries, Inc.*, 278 F.2d 79, 90;

(4th Cir. 1963) *Beaty Shopping Center, Inc.* v. *Monarch Insurance Co. of Ohio*, 315 F.2d 467, 469;

(5th Cir. 1962) *National Surety Corp.* v. *Musgrove*, 310 F.2d 256, 262;

(5th Cir. 1967) *Blount Brothers Corp.* v. *Reliance Ins. Co.*, 370 F.2d 733, 739;

(6th Cir. 1968) *Smith* v. *Illinois Central Railroad Co.*, 394 F.2d 254, 257;

(7th Cir. 1963) *Pinkowski* v. *Sherman Hotel*, 313 F.2d 190, 193;

(8th Cir. 1966) *Ralston Purina Co.* v. *Parsons Feed & Farm Supply*, 364 F.2d 57, 60;

(8th Cir. 1967) *Chicago, Burlington & Quincy Railroad Co.* v. *Beninger*, 373 F.2d 854, 859;

(9th Cir. 1966) *Woody* v. *United States,* 368 F.2d 668, 671;
(10th Cir. 1966) *United States* v. *Fenix & Scisson,* 360 F.2d 260, 262.

Our own Court of Appeals has up to now followed the usual rule, leaving questions of fact to the jury so long as there is substantial evidence. Accordingly, in *Sorrels* v. *Alexander,* 142 F.2d 769 (D.C. Cir. 1944), it was said:

> "... while we might have reached a different result, we may not on that account substitute our guess for that of the jury."

No decision is known in any Circuit where a Court of Appeals has exercised jurisdiction to reweigh the evidence and discard the jury verdict, as the Court of Appeals did in the case at bar.

No purpose would be served by multiplying citations to establish the principle of law. It has never been doubted since the Bill of Rights, containing the Seventh Amendment, was ratified.

(b) In Its De Novo Review of the Record and Rejection of the Jury Verdict, the Court of Appeals Has So Far Departed From the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of This Court's Power of Supervision.

While the foregoing authorities indicate clearly that the decision below is at odds with every accepted concept of federal law, the case has national importance in the administration of justice. By virtue of its location in the District of Columbia at the seat of Government, this Court of Appeals is entrusted with the constitutional rights of citizens from every State who may have business with the Federal Government or

those who hold office here. This central role in the judicial hierarchy gives decisions of this Court of Appeals a truly national stature in interpretation of federal constitutional rights.

Plainly the decision below establishes a pattern for *de novo* review of the evidence, and reduces every jury verdict to a merely advisory opinion on the facts, which must square with the views of the Court of Appeals, or be annuled. This affects the basic rights not only of petitioner and local residents, but of the multitude of citizens, government officials and employees, members of Congress, business men, and visitors from all the States who constantly circulate through the capital city.

They lose the constitutional right to benefits of a jury trial and verdict—unless it stands up under "our own review of the evidence" by the Court of Appeals (414 F.2d at 1212, n. 4), and be deemed not only supported by evidence, but reasonable to that Court.

Such erosion of the Constitution requires again that this Court "jealously guard" the right to trial by jury, for the sake of all those who come, in any role, to the seat of Government. *Jacob* v. *City of New York*, 315 U.S. 752 (1942).

II. IN LIMITING THIS COURT'S RULING IN BURNETT v. NEW YORK CENTRAL RY. CO., 380 U.S. 424, 428 (1965), TO FELA CASES, THE DECISION BELOW MISCONSTRUES THIS COURT'S DECISION, AND CONFLICTS WITH THE APPLICATION THEREOF IN THE NINTH CIRCUIT.

Petitioner had asked the Court of Appeals to follow the reasoning of this Court in *Burnett* v. *New York Central Ry. Co.*, 380 U.S. 424, 428 (1965), holding that the timely filing of suit in a State court suspended the

running of the statute of limitations, even though the State court could not render judgment in the case.

This Court held that following dismissal of the State court action, a prompt refiling in the Federal court was not barred by limitations, though the actual period named in the statutes had run. Pendency of the other action had tolled the statute because the defendant corporation was aware that it was being held to answer and could claim no prejudice from the delay. Parallel cases cited in the Court of Appeals were *Herb* v. *Pitcairn*, 325 U.S. 77 (1945); and *Berry* v. *Pacific Sportfishing, Inc.*, 372 F.2d 213, 215 (9th Cir. 1967). Petitioner claimed that timely filing and pendency of the suit in Ohio had the effect of tolling the District of Columbia statute of limitations. This Ohio suit was filed in 1959, more than a year before the conduct claimed to found the estoppel in June 1960 (App. 9a). The Court of Appeals declined to apply the rule (App. 4a, n. 4) "because this is not an FELA case."

However, this Court in the *Burnett Case* plainly said of the limitations rule:

> (p. 428) "This policy of repose, designed to protect defendants, is frequently outweighed, however, *where the interests of justice require vindication of plaintiff's rights*" (Italics supplied).

In no way is this principle of jurisprudence limited to FELA litigation. It simply stated a general rule of policy in embracing terms previously expounded in *Holmberg* v. *Armbrecht*, 327 U.S. 392, 396-7 (1946). This rule was applied by the Ninth Circuit to a case which had no FELA connection, and the statute of limitations was held to be suspended by timely, though

erroneous, filing in a State court. *Berry* v. *Pacific Sportfishing, Inc.*, 372 F.2d 213, 215 (9th Cir., 1967).

These cases were referred to in petitioner's appellate brief. It is plain that in this respect the Court of Appeals decision conflicts with an applicable decision of this Court, and an application of that decision in the Ninth Circuit.

CONCLUSION

Because of the conflict with decisions of this Court, and with those of other Circuits, the decision below should be reviewed in order to protect the constitutional integrity of the Seventh Amendment, and preserve the right of trial by jury against judicial encroachment.

In *International Terminal Operating Co.* v. *Nederl. Amerik, supra.* (p. 6), a single order granted certiorari and reversed the judgment for reasons identical to those herein assigned in Point I. Petitioner so prays the Court in the case at bar.

Respectfully

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November 17, 1969

APPENDIX

BROWN v. LAMB and DISPATCH, INC.,

414 F.2d 1210 (D.C. Cir. July 17, 1969)

Before BAZELON, *Chief Judge*, McGOWAN and TAMM, *Circuit Judges*.

PER CURIAM: In this suit to collect legal fees, the issue before us is the propriety of the trial court's grant of judgment in favor of appellees notwithstanding a jury verdict for appellant. The fees in question were billed on June 18, 1957, and there is no dispute that the applicable three-year statute of limitations, 12 D.C. CODE § 301(7) (1967), would normally have run in June of 1960. Appellant, however, had successfully resisted a pretrial motion for summary judgment on representations that there were material issues of fact to be tried with reference to whether appellees were estopped from pressing the limitations defense. At the close of the trial, as to the conduct of which no procedural errors are alleged by appellant, the jury found for appellant. The trial court, on appellees' motion, entered judgment for them upon its finding that "the statute of limitations had run prior to the filing of this action, and that no evidence was adduced at trial of a character requisite for taking this action out of the statute of limitations."

In this court appellant argues essentially that there was evidence in the record adequate to support a jury conclusion that appellees were estopped from claiming the shelter of the statute, and that the grant of judgment n.o.v. could only represent error by the court in either (1) its appraisal of the evidence by reference to an estoppel standard or (2) in concluding that as a matter of law the limitations statute does not under any circumstance yield to the estoppel principle. In this latter regard, appellant points to the fact that, in granting the judgment n.o.v., the trial court included in its authorities a citation of 28 D.C. CODE § 3504 (1967).[1]

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[1] This provides in relevant part:

> In an action upon a simple contract, an acknowledgment or promise by words only is not sufficient evidence of a new or

It can be argued that that statute evinces a Congressional pupose to make a written promise or acknowledgement the exclusive escape route from the rigors of the limitations period. If this interpretation of section 3504 was at the root of the trial court's ruling, then the ruling was wrong, says appellant, because the interpretation is wrong.

The record presents some ambiguities with respect to the precise role played by section 3504 in the trial court's thinking. There are expressions in the transcript, before the submission of the case to the jury and in connection with appellees' motion for a directed verdict, which are subject to the inference that the court was preoccupied with the writing requirement of section 3504 as a possibly absolute command admitting of no other exceptions to the bar of the statute of limitations.[2] In its final disposition, however, the court's citation of that statute was accompanied by a reference to cases in this jurisdiction which indicated that the doctrine of equitable estoppel can prevent a suit from being barred by the statute of limitations.[3] Most impor-

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continuing contract whereby to take the case out of the operation of the statute of limitations or to deprive a party of the benefit thereof unless the acknowledgement or promise is in writing, signed by the party chargeable thereby.

The D.C. CODE provision which has its counterpart in the statute books of nearly every state, is based on Lord Tenderden's Act, 9 George IV. Ch. 14, § 1 (1828). *See* 1 WOOD, LIMITATION OF ACTIONS § 82 (1916).

[2] This restrictive interpretation of § 3504 was vigorously urged upon the trial court by appellees in support of their motion for a directed verdict. Acceptance of this argument would have meant, at most, that the court would have left to the jury only the question of whether there was a writing within the meaning of § 3504. But the court decided to deny the motion, and thereafter proceeded to instruct the jury, first on the need that a "new promise" or "acknowledgment" be in writing, and thereafter on the separate issue of the estoppel exception. Its instruction on the estoppel issue was unexceptionable in that it did not suggest that § 3504 required an estoppel to be based only on written evidence and could not consist of oral conversations alone.

[3] The court cited Hornblower v. George Washington University, 31 App.D.C. 64 (1908); Moore v. Snider, 71 App.D.C. 293, 109

tantly, the court's instruction to the jury enunciated the estoppel approach, making it clear that on a proper factual showing relevant to that principle appellant could be relieved of the prescriptive restraints even though there was no written undertaking or acknowledgment. It seems clear to us that the court, with commendable prudence in terms of efficient judicial administration, submitted the estoppel issue to the jury on the theory contended for here by appellant despite its doubts about the adequacy of the evidentiary showing, and, when the jury came in with its verdict for appellant, granted judgment n.o.v. as contemplated by FED. R. CIV. P. 50.

This appeal is thus narrowly confined to the question of whether the trial court weighed the evidence wrongly for the purposes of Rule 50. Our close reading of the record does not warrant our saying that it did. We note in this regard that appellant's evidence was designed to show that appellant was lulled into inaction by the informal assurances of appellee Lamb which assertedly continued over a

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F.2d 840, *cert. denied*, 309 U.S. 685 (1940); and Howard University v. Cassell, 75 U.S.App.D.C. 75, 126 F.2d 6 (1941), *cert. denied*, 316 U.S. 675 (1942). In *Hornblower* the court, after determining that a letter was not sufficient evidence to amount to a new contract, went on to consider whether an agreement by the parties to arbitrate created an estoppel, thereby barring the invocation of the statute of limitations. Although deciding that the facts presented did not establish an estoppel, because the defendant had not "done something that amounted to an affirmative inducement to plaintiffs to delay bringing action," the court did clearly state that:

> We think it is a well-settled principle that a defendant cannot avail himself of the bar of the statute of limitations, if it appears that he has done anything that would tend to lull the plaintiff into inaction, and thereby permit the limitation prescribed by the statute to run against him. If, by this agreement to arbitrate, it appears from the record that plaintiffs, by the action of the defendant, were induced not to bring their suit, then we think defendant would be estopped from pleading the bar of the statute of limitations.

In the *Cassell* case, this court quoted the above language from *Hornblower* with approval, and again found that on the facts presented an estoppel was not warranted.

period of several years. But these alleged assurances and requests not to sue were not enough to keep appellant from bringing a suit for the fees in a state court of Ohio in April, 1959, a suit which is still pending. And it seems not unlikely that the three-year further delay in filing suit in the District of Columbia was induced less by Lamb's representations than by appellant's knowledge as a lawyer that he had a precautionary anchor to windward in the form of the Ohio suit. We do not think the District Court erred in concluding that the evidence fell short of showing the element of reliance to the degree required by the doctrine of equitable estoppel.[4]

Affirmed.

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[4] Even if it be assumed that the trial court changed its mind about the propriety of its having submitted the estoppel issue to the jury, and granted the motion n.o.v. solely because it eventually embraced the position that § 3504 left no room for the operation of equitable estoppel based on unwritten evidence, the judgment dismissing the complaint should still stand. Such a reading of the statute would be incompatible with the spirit of our prior expressions on this subject, *see* n. 3 *supra*, and with the more persuasive authorities. *See* Albachten v. Bradley, 212 Minn. 359, 3 N.W. 2d 783 (1942). "Among all the spheres of its activity estoppel probably plays no more useful service than the alleviation of hardship caused by statutes of limitation." Dawson, *Estoppel & Statutes of Limitation*, 34 MICH. L. REV. 1 (1935). In the unlikely event that the learned trial court failed to consider the evidence in relation to the estoppel claim because of an erroneous interpretation of § 3504, our own review of the evidence for this purpose establishes its inadequacy to impose an estoppel. No person, especially a lawyer such as appellant here, could reasonably rely on the representations allegedly made by or on behalf of appellees.

We have also considered and find without merit the appellant's contention that the judgment n.o.v. should be reversed on the ground that the D.C. statute of limitations was tolled by the filing of the suit in Ohio. Burnett v. New York Central R.R. Co., 380 U.S. 424 (1965) is inapposite because (1) this is not an FELA case; (2) the Ohio suit filed by appellant was not dismissed on grounds of improper venue; and (3) appellant filed his D.C. suit more than three years after he filed in Ohio—in *Burnett* the plaintiff filed within eight days of the dismissal of the Ohio suit.

Constitutional Provision, Statutes, and Rules Involved

7th Amendment, U.S. Constitution:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

District of Columbia Code, Sec. 28-3504 (1967):

> In an action upon a simple contract, an acknowledgment or promise by words only is not sufficient evidence of a new or continuing contract whereby to take the case out of the operation of the statute of limitations or to deprive a party of the benefit thereof unless the acknowledgment or promise is in writing, signed by the party chargeable thereby. * * *

Testimony of Russell Morton Brown

* * * * * * * * * *

[Tr. 843] [1] Mr. Brown, when we were interrupted you were [Tr. 844] telling us that Mr. Lamb said something to you about the Blau case. What was that, again, sir? A. Yes, he said the Blau case was a claim that was very distressing to him and involved a lot of money. He claimed that he had made over two million dollars in respect to his profits in trading on the stock exchange—

Q. No, don't tell us the amount. Just the subject of the discussion. A. Trading in the stock, that he didn't want any more lawsuits, especially he didn't feel he could stand the publicity because he was engaged in the struggle for the control of the Seiberling Rubber Company and that was listed on the New York Stock Exchange, and he said: "If you will just withhold your action, please," he said, "I will get straight with you."

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[1] The brackets herein refer to pages of the transcript.

He said: "You know. Howard has always been my lawyer and you and Howard are in touch. I will work it out with you through Howard and I will be very reasonable with you."

And he said: "But I don't want any more lawsuits [Tr. 845] now and I have to ask you please, don't bring a suit in the District of Columbia especially."

Q. Now, then, did you part on that note? A. Well, I didn't make any promises, but we talked some about other things, and Howard McGrath, and about keeping in touch with Howard and he said: "I am going away on a skiing trip again," and for me to keep in touch with Howard McGrath and I said: "I always do—I will."

Q. Subsequent to that was there any other effort made to talk about payment of your fee? A. Mr. Burke, I talked with Howard McGrath about this subject and he told me he was in touch with Mr. Lamb and one thing that Mr. Lamb did say when we were there in New York, which Howard McGrath also repeated, was that the FCC case had been extremely expensive and he said it had cost him a lot of money, and that it was taking a lot of money to build the station back up, that he had to have time—he needed time.

Howard McGrath repeated this to me after that January 1959 meeting, and Easter of 1959, particularly. I did go down to General McGrath's house with Sumne Miller when she was in Washington, and we talked with him generally [Tr. 846] about a wide variety of things including this, and he said that he was very hopeful that Mr. Lamb would be back on his feet and able to take care of this bill, not only for me but for General McGrath himself, in the near future, because Mr. Lamb was tied up with Seiberling and was in several other things and he just needed time.

Q. Actually, Mr. Brown, up to this point as is shown on this board, neither you nor General McGrath had received any money in connection with the WTCU-TV case? A. Well, at that time, Mr. Burke, I really must confess I didn't know about General McGrath's arrangements.

Q. But since then you have acquired the knowledge? A. Yes, since then I have acquired the knowledge which is reflected on the blackboard, but I talked with General McGrath several times. I was handling some legal matters for him and we discussed it and I am particularly mindful of the date, at least in 1960 when I was in General McGrath's home and Sunne Miller was here and she came on an advertising woman's convention of some kind, I think, and we were at General McGrath's residence and there was some kind of conversation that took place in [Tr. 847] June of 1960. I had lunch with Howard McGrath—

Q. What part of June? A. This was early in June, Mr. Burke; I would say the first week in June, and the General and I were talking about—

* * * * * * * * * * *

The Witness: General McGrath and I had lunch at the Mayflower Hotel and I told the General I was through waiting—I just couldn't wait any longer.

After lunch we were walking back to his office, towards his office, and he asked me to come upstairs wtih him and I did.

[Tr. 848] He said he wanted to call Mr. Lamb.

He placed a call to Mr. Lamb in Toledo and he told him about our lunch conference and that I was going to go ahead and file suit in the District of Columbia.

I didn't hear Mr. Lamb's end of the conversation, of course, but General McGrath gave me the telephone, after explaining—I heard him say on the telephone what I had told him, and then I got on the telephone and I spoke to Mr. Lamb and he said, he was very friendly, and he said "I just don't want you to file a lawsuit now, Russ" he said. I am right in the midst of several important business matters. The Seiberling matter is taking a lot of money—it is taking all the money I can manage to raise. I am involved in that Blau suit in New York and it is not going too well. The Erie station is coming back nicely but it's going to take some time to build up."

He said, "I need time and I will get straight with you but I want you please to delay any lawsuit."

He said, "I mean, you and I should not have any lawsuits. I will never forget what you did for me." He said, "I know you are the one that I owe my good results to."

He said "You really saved the day for me, and if you will just give me time, I am sure that you and I will be [Tr. 849] able to compose our differences.—We will be able to settle very satisfactorily if you will just give me time to get my affairs in shape."

He said, "You know, I went through a terrible time in the FCC hearing and it has taken me a long time to get straightened out, and then I got involved in this Blau suit while the hearing was going on, and now I am in the Seiberling takeover."

He said "If you will just give me time and not file a suit," he said, "we don't need any more lawsuits—that is not the way to do things." He said "We all lose money that way.

And he said "We ought to save the expenses and settle our differences—now will you do that please?" He said "You are there with Howard and you know Howard has always been my lawyer, and you have confidence in Howard and I want you to have confidence in me."

I said "Well I will talk it over with Howard," and I hung up.

I then talked with Howard McGrath and he assured me that he had absolute confidence in Mr. Lamb's sincerity, and he said that Mr. Lamb had always been extravagantly lavish in his praise of the work I had done for him, and that he was certainly eager to pay me but he just needed [Tr. 850] time, so I agreed to delay the filing of the lawsuit on that basis.

Q. Now this was in the first week of June 1960? A. That is my recollection, Mr. Burke.

* * * * * * * * * *

[Tr. 851] Q. Meanwhile, Mr. Brown, taking you back to 1959—did there come a time when you filed suit in Ohio? A. Yes.

Q. And do you recall when that was? A. That was in the Spring of 1959—in April.

Q. And what happened to that suit? [Tr. 852] A. This suit is still pending in Ohio.

Q. Was there any conversation or any understanding relative to the suspension of activities in that suit?

* * * * * * * * * * *

The Witness: After I had filed that suit, General McGrath called me and he said that this was very bad for Mr. Lamb and he was sorry I had filed the suit. Some time went by and the matter was not moving ahead and General McGrath talked with me and asked me if I would please take no steps to bring it to trial, because he was sure that Mr. Lamb would make a serious and sincere effort to settle my claim for legal services.—He particularly said that it would be undesirable to have a suit filed in the District of Columbia, and that if we would just let the suit stay there in the status quo out there in Toledo, he would be very grateful, and that Mr. Lamb would make settlement arrangements at his first opportunity.

* * * * * * * * * * *

[Tr. 853] By Mr. Burke:

Q. Did you at the time that you filed this suit in the District of Columbia—or rather were you at that time faced with any impediments in connection with prosecuting the same suit in Ohio? A. Yes—all of these records which are on the table are in the custody, the legal custody, of the Federal Communications Commission here and I had no way to get them out there in Ohio to use in the conduct of the case.

Not only that, but at the time, the witnesses who knew most about the case were here—that is, J. Howard McGrath, Mr. Jim McInerney, and the people at the FCC who

know who had tried the case and knew all about what my part of it had been and what the importance of it was.

So the natural place to conduct the suit was in the District of Columbia and not out there in Ohio.

[Tr. 854] Q. Well now, after December of 1962 when you had your last correspondence, I believe, with Mr. Lamb —did there come a time when you realized that you were not going to get paid unless you proceeded with that suit? A. Well that was very plain Mr. Burke—and I came to that conclusion because General McGrath had talked with Mr. Lamb and no results had ever come from any of those conversations.

He couldn't tell me when anything was going to be done.

Q. Did there come a time when you had a meeting with General McGrath and advised him that you were going to go ahead with your suit? A. Yes—what happened was that Mr. Lamb came to town actually to give a party for the publication of his book—"No Lamb for Slaughter"—and General McGrath was going to be a guest at that party, I think, and this was in May of 1963.

* * * * * * * * * * *

[Tr. 856] The Witness: I told General McGrath that I was going to proceed with the suit.

Mr. Burke: I would ask the Court to take judicial notice of the date of the suit—I have the file here, Your Honor.

The Court: The date of the filing is May 21, 1963.

* * * * * * * * * * *

Testimony of Mrs. Sunne Miller

[Tr. 551] Direct Examination

Q. Mrs. Miller, would you state your full name? A. My name is Sunne Miller.

Q. How do you spell that "Sunne"? A. S U N N E.

Q. Where do you live, Mrs. Miller? A. 5321 South Main Street, Sylvania, Ohio.

Q. You said Sylvania—is that a suburb of Toledo, Ohio? A. Yes, sir.

Q. And in what profession or calling are you engaged? A. I am associated with a public relations and advertising firm.

Q. Now I direct your attention to the years 1952, 1953, 1954 and 1955—where were you employed at that time? [Tr. 552] A. I was manager of radio station WTOD in Toledo, Ohio.

Q. And who was the owner of that station? A. Unity Corporation.

Q. I am sorry— A. Unity Corporation.

Q. Who has the head of that corporation? A. Well—Edward Lamb.

* * * * * * * * * *

Q. Edward Lamb—is that the gentleman who is sitting here? A. Yes, sir.

Q. Now would I be correct in saying then that you were employed under his supervision? A. Yes.

Q. Now did there come a time, Mrs. Miller,—well I will ask you this: What did your duties require you to do? A. Well, I was manager of the radio station which would mean that I planned the programming and directed the sales of the organization.

* * * * * * * * * *

[Tr. 554] Q. May I ask you this: Did there come a time when you met General McGrath? A. I met General McGrath prior to coming to Washington.

Q. And when was that—on what occasion was that? A. Well I would think it was at the beginning—I forget, but I would say at the beginning of 1954 when there was a party given in Mr. Lamb's offices for General McGrath and Mrs. McGrath.

Q. Was Mr. Brown there? A. No.

Q. Now, did there come a time when you came back to Washington then?

Did you hear my question, Mrs. Miller? A. I don't believe so.

Q. I say, did there come a time when you came to Washington? A. I came to Washington numerous times because we were engaged in other television hearings as well.

Q. I mean in connection with the Federal Communica- [Tr. 555] tions Commission hearing on station WICU-TV? A. Well you wish me to be specific—I came on that particular matter and I also came for the purpose of formulating plans for an application to the Federal Communications Commission for the acquisition of a station on channel 11.

Q. But can you tell us when was the first time you came to Washington for the purpose of helping in the preparation of the WICU-TV case? A. I would say that would be in the Fall—in September of 1954.

Q. At that time did you have conversations with or instructions from Mr. Lamb? A. Well, prior to my departure for Washington and the FCC case was to begin in a few days, I had some personal files on witnesses that I had looked up and I was, Mr. Lamb told me that I was to go to Washington and go to Mr. McGrath's office and discuss the case with Russell Brown.

Q. Did he tell you anything else in connection with your relationship with Russell Brown? A. He told me that he wanted Mr. Brown to try the case, he had discussed it with him, about this previously, [Tr. 556] and Mr. Brown struck him as being a very aggressive and knowledgeable lawyer.

Q. Now following these instructions, did you come to Washington? A. Yes, sir.

Q. And you brought all of your materials with you? A. Yes, sir.

Q. Mrs. Miller—the hearing commenced on the 15th of September 1954—did you arrive before the commencement of the hearing? A. Yes, I did.

Q. And how long did you remain in Washington? A. At that particular time?

Q. Well—throughout the hearing period? A. I was there practically the entire hearing period—until it concluded, I believe, at the end of May, 1955.

Q. Now during that period of time, were you in attendance at the Federal Communications Commission during the course of the hearing? A. Practically every day.

* * * * * * * * * *

[Tr. 579] Q. Mrs. Miller, the hearing was terminated I think you have testified at the end of May, 1955, were you present, either before or after that time, when any further discussions were held by Mr. Lamb or Mr. McGrath about the matter of Mr. Brown's fees? A. I discussed it with General McGrath on numerous occasions.

Q. And can you give me the dates of some of those discussions? A. Well, there was a discussion after the case ended—I would think it would be during the time that the brief was being filed—probably in June, or maybe July, something was being prepared, and Mr. Brown was very dissatisfied and he, General McGrath, asked me to calm him down—

* * * * * * * * * *

The Court: Who was present at the time of this discussion please?

The Witness: General McGrath—Vincent Gaughan and myself.

The Court: Just the three of you?

The Witness: Yes.

* * * * * * * * * *

[Tr. 585] By Mr. Burke:

Mrs. Miller, you have testified that you had several conversations with General McGrath concerning Mr. Brown's fee and I asked you if you could give the date of those and you said some time either in June or July when the final briefs were written—I think you meant findings of fact and conclusion of law. A. Well I don't know exactly what term it is.

* * * * * * * * * *

Q. Now what was said at that time concerning [Tr. 586] Mr. Brown's compensation or fee? A. Well, General Mc-

Grath and I were very good friends and General McGrath asked me if I would talk to Russell Brown about his claims for fees, that the case was not really completed and that Mr. Brown was very restive and very upset because he hadn't been, I suppose that the expression is "taken care of"—he had not received his legal compensation for the case and he had spent a year and a half on it, and the General asked me to speak to Mr. Brown and say to him "Just wait until things were settled."

Q. All right—what was the next occasion when you spoke to either General McGrath or Mr. Lamb or both concerning Mr. Brown's fees? A. I don't think I ever really discussed it at any length with Mr. Lamb, at any time. I discussed it with General McGrath practically every time I came to Washington, because I went to visit him.

Q. Did there come a time when you were in Washington in 1959? A. I was in Washington several times in 1959.

Q. And was there an occasion when you were in Washington in 1959 when you had a meeting with General [Tr. 587] McGrath and or Mr. Brown? A. Yes.

Q. And when Mr. Brown was there that question was raised? A. I was at the General's home with Mr. Brown.

* * * * * * * * * *

By Mr. Burke:

Q. And at that meeting with General McGrath and Mr. Brown in 1959 when you say you were staying at General McGrath's or you met at General McGrath's home, what if anything was said by General McGrath concerning Mr. Brown's fee? [Tr. 588] A. The General said that Mr. Lamb will take care of everything and Mr. Brown had been, I believe had filed suit in Toledo—at least I know he had been in Toledo and as to what the time of the filing of the suit in Toledo was I do not know—or do not recall, but he said "If you will stop filing suits everything will be all right."

Q. And about when in 1959 was that? A. It would be at Easter time.

Q. Now do you recall another occasion in 1960 when you talked with General McGrath? A. I came back to some advertising conference at that time and I talked to the General again.

Q. By the way—in what capacity were you attending that convention? A. I was president of the Advertising Club.

Q. I see.

* * * * * * * * * *

[Tr. 590] By Mr. Burke:

Q. Now, Mrs. Miller, when you are talking about withholding suit, did you have any relationship to that suit in the District of Columbia? A. Well, I was present when General McGrath asked Mr. Brown not to file suits in the District and not [Tr. 591] to file them anywhere.

Q. When was this? A. This was I would say around Easter time of 1960.

Q. In 1960? A. Yes.

Q. Now when he asked him not to file any suits what if anything did he say about Mr. Brown's fee? A. He said he would be taken care of.

Q. By whom? A. By Mr. Lamb.

* * * * * * * * * *

Motion for Directed Verdict at the Conclusion of the Plaintiff's Case

[Tr. A-2] Mr. Baker: If the Court please, and if Your Honor will indulge me at this time, I would like to make a motion for directed verdict on behalf of both of the defendants in this case, Edward O. Lamb and Dispatch, Inc., based on the following grounds.

The Court: Now, Mr. Baker, I am going to let you make this statement, and I can anticipate what you are going to say, but I want to let you know that I feel a lot of time has been spent on this case now—how many days is it?

Mr. Baker: Almost nine days.

The Court: Nine days. And the jury has heard all of this evidence, and after we have spent so much time on it,

it would seem to me better to let them pass upon it. However, you go ahead and tell me what you wish to say.

Mr. Baker: I will be guided by whatever Your Honor has in mind, but at this time I would like to make a motion, and I will be very brief about it.

[A-3] The first point is that there is no question from Mr. Brown's testimony that the services that he allegedly rendered in this case terminated on June 18, 1957, and the record in this case as to this particular suit clearly shows that the suit was filed on May 21, 1963.

* * * * * * * * * *

[A-4] * * * I merely want to again call attention to the same section of our statute, which is No. 28, Title 28, Section 3504, relating to the matter of taking a claim out of the Statute of Limitations.

In holding that there must be some writing signed by the party to be charged in order to take it out of the Statute of Limitations, that case is right on point here, [A-5] because there is nothing of that in this case.

Now, insofar as the Defendant Lamb is concerned, there is no question that the suit was filed beyond the three year period of time after the services were completed and that service was upon him some six years later.

In addition to that, the same thing applies with regard to the extension of a statute beyond a three year period as to a writing obligating him, saying that he acknowledged the debt and that he in fact revives the debt and prolongs the statute.

The Court: Let me ask you this: What is the writing that the plaintiff relies upon, if any, in this case, because the statute says that an oral statement is not enough. Do you know what writing it is that they rely upon, if any?

Mr. Baker: There isn't any.

The Court: Well, I don't know, but I thought what they claimed was that some of this correspondence did constitute an acknowledgment of some kind. Now, I am just seeking enlightenment.

Mr. Baker: The only piece of correspondence which [A-6] has been offered in this case, and which is in the record here, is a letter which Mr. Brown wrote in 1962 to Mr. Lamb saying: "Can we get together?"

Now, the response to that letter by Mr. Lamb was: "We can talk about it without prejudice." But that referred solely to the Ohio litigation; that was the only thing that was pending, and it is still pending, for that matter, because that was the first suit that was filed in this case and it has never been disposed of.

The Court: Oh, you are saying that this 1962 correspondence referred to the Ohio suit, but not to this suit?

Mr. Baker: Yes, Your Honor, because this suit was not filed in 1963, and so they could not have had reference to it.

The Court: What was said in the 1962 letter that would indicate that he does make an acknowledgment or promise?

Mr. Baker: Oh, there was nothing. There was no such language in this letter, and if Your Honor will read the letter which is in the record, I don't have it in front [A-7] of me, but I remember that Mr. Lamb said: "I will be glad to discuss it with you without prejudice," but the letter is in the record.

The Court: You know, there is a case in the District where some alleged letter, I think, agreed to an arbitration, and where the Court of Appeals said that even though that was so it wasn't an acknowledgment or a new promise.

Mr. Baker: Your Honor, it is correct—and I am not sure of that particular case that Your Honor has in mind—but I know that in the case of Howard University vs. Cassell, which Mr. Hayes very ably took up to the Court of Appeals and reversed, in that case they said that not only must there be an admission of it, but there must be an acknowledgment or an inducement to not go ahead with the case, and even though Mr. Cassell, the architect, many months after the service was terminated had discussed it and talked of arbitration, and maybe this is the one that Your Honor has in mind—

The Court: It could be.

Mr. Baker: And that his bill was going to be [A-8] submitted to the board for arbitration, there was never any acknowledgment or inducement by Howard University to Cassell to say: "We are going to pay this debt," so as to take it out of the statute.

In fact, this landmark case went up to the Supreme Court and certiorari was denied. So, I am indebted to Mr. Hayes for that very able result, and I think he is estopped in this jurisdiction. But, again, without belaboring the matter, I respectfully refer Your Honor to the memorandum which we have filed in this case and these points that I have left listed are basically the ones upon which we rely in our Motion for Directed Verdict in favor of these defendants at this time.

The Court: Mr. Hayes, do you wish to comment in reply to Mr. Baker?

Mr. Hayes: Yes, Your Honor, and I probably should begin by thanking my friend for his congratulatory suggestions, except for the fact that he doesn't tell Your Honor what the actual references are.

* * * * * * * * * *

[Tr. A-13] Now, in addressing myself to the question of whether the statute has or has not run, and the suggestion about having something in writing in order to waive the statute—

The Court: Well, it is not exactly a situation. There is a statute that says that.

Mr. Hayes: Well, what I am calling Your Honor's attention to is the approach, apparently, by Mr. Baker that this cannot be done; that there must be something in writing in order to waive it. That is not the law in our jurisdiction. And let me read from Hornblower.

The Court: Now, when was Hornblower decided?

Mr. Hayes: 1908.

The Court: 1908?

Mr. Hayes: That is correct.

The Court: You know, this statute has been changed several times.

Mr. Hayes: Yes, I know, but this same case has been cited with approval, and there has been nothing that reverses it and it treats it on an entirely different basis [A-14] than what Mr. Baker's approach to it is. And I think that this is a factual situation which Judge McGarraghy has indicated is a factual situation for the determination of the jury.

Here is a question of equitable estoppel when a party, the defendant, induces a person to refrain from bringing his cause of action for them to come in and then to plead the statute.

The Court: But, I would like for you to tell me what it is that he did, that you say he did, that you are relying on.

Mr. Hayes: Yes, Ma'am. We are relying on the fact that he himself, according to his testimony which has been adduced, asked Mr. Brown not to go further, affirmatively asked him not to proceed to bring the suit.

The Court: Well, now, this statute says that such testimony standing alone is not sufficient.

In other words, what Mr. Brown says that Mr. Lamb said about it, just standing by itself, is not enough. I think otherwise there would be no reason for having a Statute of Limitations, because a person could get up and [A-15] say somebody said something to him at any time.

Mr. Hayes: But, Your Honor, this doesn't just stand by itself.

The Court: Well, that is what I am trying to find out. I don't know what else it is that you hitch it to.

Mr. Hayes: There are also the statements made by Mr. McGrath, and the statements from Mr. Lamb to Mr. Brown that Mr. McGrath is handling this matter for him: "You get in touch with him;" we say that this is an inducement and that there is Mr. McGrath's inducement to Mr. Brown.

The Court: Well, telling someone to get in touch with somebody doesn't constitute acknowledgment.

Mr. Hayes: No.

The Court: Or promise.

Mr. Hayes: No, I am not saying that it does. But Mr. Lamb, by telling Mr. Brown to get in touch with him, was making a promise, because he says Mr. McGrath is his counsel and he is the one who will handle this for him. And then Mr. McGrath says to Mr. Brown that Mr. Lamb is in difficulties, there are various suits pending and that he will take care of the matter properly—please don't file the suit, don't go forward with the suit, and if you don't [A-16] go forward with it, then this man is going to take care of this properly, you will be taken care of properly.

This I respectfully suggest to Your Honor is an inducement, an express inducement.

In our jurisdiction, starting with the Hornblower case, and in the headnotes, although I am aware of the fact that a headnote is not probably the best place to read from, but it is expressed here so forcefully, and if Your Honor please, I will go back to the opinion, if Your Honor wishes, but the language here is:

"While a defendant cannot avail himself of the bar of the Statute of Limitations if he did anything to induce the plaintiff to delay bringing suit"—

Now, that is a statement of the law, the defendant cannot avail himself of the Statute of Limitations when he does anything to induce the plaintiff to delay bringing a suit. And this case, which I think was the one Your Honor had in mind, says:

"The mere agreement to arbitrate and the selection of an arbitrator, not followed up by any steps of the plaintiff to have the matter [A17] submitted, or any act of the defendant to prevent submission, will not estop the defendant from relying on the statute."

But this case specifically indicates that the law is that he cannot induce him not to file suit and then later himself plead the statute.

Now, I call Your Honor's attention to the case of McCloskey vs. Dickinson, a 1947 case, decided, or the opinion was handed down by Judge Cayton, 56 A 2nd 442—

The Court: Now, is that the one that dealt with the Workmen's Compensation aspect?

Mr. Hayes: Well—

The Court: Or some wages, or something?

Mr. Hayes: Well, there was some question about compensation in it, Your Honor; as to whether or not it was compensation, Workmen's Compensation involved, I don't now recall, but it was how the man's wages were to be determined, I believe.

The Court: Yes.

Mr. Hayes: And in that case, if Your Honor please, I read this significant language:

[A-18] "We think it is a well-settled principle that a defendant cannot avail himself of the bar of the Statute of Limitations if it appears that he has done anything that would tend to lull the plaintiff into inaction."

The Court: Yes, but in that case, as I recall it, there was a Commission or a Board that was to make a determination, and the alleged debtor told the plaintiff that when the hearing was over, or when they got word from this Board or Commission that they had made a determination, they would pay him if anything was due him. Then when they got the notice and the determination was made, they did not notify him, and they didn't make any payment to him.

* * * * * * * * * * * *

[A-22] The Court: But this is something in writing. What [A-23] you have here is some oral statement of Mr. Brown's that Mr. Lamb said something.

Mr. Hayes: But fundamentally, if Your Honor please, the point is whether he had done anything to induce him not to go forward in his suit, and there was reference to the Cassell suit—

The Court: Well, I think you are going to have to have something in writing.

Mr. Hayes: Well, the cases don't say that, if the Court please.

The Court: I think the law says that.

* * * * * * * * * * *

[A-31] (Mr. Baker:) So that I say to Your Honor that because there is no compliance with the statute as to anything in writing which would take the case out of the statute, I respectfully submit to Your Honor that there should be a directed verdict in favor of these defendants at this time, in view of all of the evidence in the case which has been admitted by the plaintiff, and giving the greatest weight to everything that he has produced up to this time.

The Court: Well, now, as I said before, Mr. Baker, before you started this argument, we have spent about nine days on this case, and I think I will submit the case to the jury. At the end of the whole case you may renew your motion, but I think I will let the jury take the case, under instruction, so at this time I will deny your motion, Mr. Baker.

Mr. Baker: Thank you, Your Honor.

* * * * * * * * * * *

Motion for Directed Verdict at the Conclusion of the Evidence

* * * * * * * * * * *

[B-2] Mr. Baker: At this time, if the Court please, I should like to move for a finding in favor of the defendant, and there is a memorandum to support it, which I have handed to Your Honor.

* * * * * * * * * * *

[B-4] I say to the Court that in lieu of all of the evidence in this case, unquestionably, this claim of the plaintiff was filed more than three years after his claim accrued and that it is beyond the Statute of [B-5] Limitations and that there

is nothing which has been adduced which takes it out of the statute. And for those reasons which I have stated before and which I have set forth in this memorandum which I have given to the Court, I respectfully urge that the Court direct a verdict in favor of these defendants on the Statute of Limitations alone.

The Court: Well, now, there is some provision in this book, this rule book, that you can make your motion, and you have made it. I will take it under advisement, but I think I am going to let this be submitted to the jury.

Mr. Baker: Well, I was hoping that there was sufficient law before Your Honor to not require its submission to the jury, because I submit that on all the evidence—

The Court: Well, I will tell you, the Courts have said that where there is any issue of fact that is involved in connection with a claim of the statute, that it has to be submitted to the triers of the fact, and in this case the jury, because they are claiming that Mr. Lamb did something—I don't know just what—to lull Mr. Brown into delaying it.

Mr. Baker: Well, of course, without going over it [B-6] again, Your Honor, the statute provides that if you are going to take it out of the statute then you have to have something in writing, and there is nothing in writing here.

The Court: There seems to be, as far as I can find out, something that is sort of up in the air about a law in the District of Columbia on the Statute of Limitations that definitely speaks of "no acknowledgement" and "no new promise can be established by an oral statement," you know, unless the defendant signed it in writing. It says that, but then I find that there are cases that talk about estoppel and they talk about "words and conduct." However, I don't find any case that doesn't have some "writing" where they talk about estoppel.

Mr. Hayes: There is the Cassell case—in that case there was no writing, Your Honor.

The Court: Well, I think they agreed—didn't they, to arbitration? Didn't they have something in writing there?

Mr. Hayes: No, there was nothing in writing. It was a question of arbitration.

The Court: I had the impression that there was.

[B-7] Mr. Hayes: The Hornblower case says something about it, but not Cassell.

The Court: Well, yours had something—it had something.

Mr. Hayes: Well, the Court took the position that estoppel was not chargeable against us because we had not done anything affirmative to lull anyone into inaction.

The Court: Well, that has been the claim here.

Mr. Hayes: But there is the statement, the affirmative statement, and that is a factual situation for the jury to determine, if there was or was not.

The Court: Well, I believe that the Appeals Court would take the view that there is a factual issue to be determined by the jury.

Mr. Baker: Well, I respectfully urge Your Honor that I think that all of the evidence in this case is clear, that there is nothing in writing to take it out of the statute, there is nothing that was said, that the case was not filed more than three years after the alleged debt accrued, and on that basis I feel my motion should be granted.

The Court: Well, I will not deny the motion at [B-8] this time.

But I will say that in reading all these decisions I have never been able to find one single one that didn't have some writing. I will read yours again, Mr. Hayes, but I think they did have some writing in there.

* * * * * * * * * *

Defendants' Motion for Judgment Non Obstante Veredicto, or in the Alternative, for a New Trial

Now Comes the defendants, by their attorneys of record, and move this Honorable Court to set aside the verdicts of the jury in the above-entitled cause entered herein on November 1, 1967, and grant them a Judgment Non Ob-

stante Veredicto or, in the alternative, a new trial in this case and for reasons state as follows:

1. That the verdicts of the jury were contrary to the law.

2. That the verdicts of the jury were contrary to evidence.

3. That the verdicts of the jury were contrary to the weight of the evidence.

4. That the jury completely disregarded the instructions of the Court with reference to the applicable law in this case.

5. That the jury's verdicts were obviously based on bias and prejudice and not on the facts presented in the trial of this case and the law as given to the jury by the Court.

6. That the verdicts of the jury are so exorbitant as to shock the conscience of the Court.

7. And for such other and further reasons that may be presented to the Court upon a hearing of these motions.

[Filed December 22, 1967]

Order Granting Defendants' Motion for Judgment Non Obstante Veredicto, or in the Alternative, for a New Trial

This matter coming on for consideration by the Court upon motion by defendants for judgment n.o.v. or in the alternative for a new trial, and upon consideration of the respective points and authorities filed by the defendants and plaintiff, and it appearing to the Court that the statute of limitations had run prior to the filing of this action,[1]

[1] D.C. Code, § 12-301 (1967) formerly D.C. Code § 12-201 (1961), limits the bringing of an action on a simple contract, express or implied, to a period of 3 years from the time the right to maintain the action shall have accrued. The plaintiff rendered no services after mid-June 1957 but did not file this action until May 21, 1963.

that no evidence was adduced at the trial of a character requisite for taking this action out of the statute of limitations,[2] and hence that the motion for judgment n.o.v. should be granted;

AND with respect to so much of defendants' motion as in the alternative seeks a new trial, the Court being of the opinion that in the event the judgment n.o.v. which is to be entered herein for defendants should be thereafter vacated or reversed[3] a new trial should be granted on the ground that the verdicts are excessive and that the manner in which plaintiff presented his case was such as to prejudice the jury against the defendants;[4]

---

[2] D.C. Code § 12-305 (1961), now D.C. Code § 28-3504 (1967), provides in pertinent part: "In actions of debt or upon the case grounded upon any simple contract, no acknowledgement or promise by words only shall be deemed sufficient evidence of a new or continuing contract whereby to take any case out of the operation of the statute of limitations or to deprive any party of the benefit thereof unless such acknowledgement or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby." See also Hornblower v. George Washington University, 31 App. D.C. 64 (1908); Moore v. Snider, 71 App. D.C., 109 F.2d 840 (1940), cert. den., 309 U.S. 685; Howard University v. Cassell, 75 App. D.C. 75, 126 F.2d 6 (1941), cert. den., 316 U.S. 675, rehearing denied, 316 U.S. 711.

[3] Rule 50(c)(1), Federal Rules of Civil Procedure, provides in part: "If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial."

[4] The claim of plaintiff in this action is grounded primarily on services rendered by him in a proceeding before the Federal Communications Commission which question the propriety of the renewal of a television license held by a corporation on the ground that the Commission had information that Mr. Lamb, a controlling officer of the corporation, was a Communist, had Communist affiliations, and had promoted Communism, etc. At the trial of this

Now therefore, it is this 22nd day of December 1967:

ORDERED That judgment non obstante veredicto be and the same is hereby entered for the defendants, and it is further

ORDERED That if hereafter said judgment be vacated or reversed, then and in that event a new trial is granted.

BURNITA SHELTEN MATTHEWS
Judge

---

action plaintiff maintained that in order to show the services he had rendered he must necessarily indicate the charges he had to overcome. However, more emphasis was placed on the charges than on the services, supplemented by prejudicial intimations that the charges were true after all. For instance, plaintiff's attorney in final argument said:

> "Ladies and Gentlemen of the Jury, one of the exhibits that was introduced by the Government (referring to the FCC case) was a book written by Mr. Edward Lamb—the defendant in this case—entitled 'The Planned Economy of Soviet Russia', and what is charged by the government against Edward Lamb is the fact that he urged the overthrow of the United States Government by force and violence. And here is what they refer to:
>
> > "If the American planned economy is to be achieved it becomes evident that those who produce, the workers and farmers, and those who defend—this is the militia men—through joint action and organization surely must assume title to the means of production."

Now, if there ever was a statement that urges the overthrow of this government by the farmers and the militia men *this is that statement* and this is just one of the many statements that they had of Edward Lamb being made and going into the communist movement, in other words, copies of the Daily Worker, to which Mr. Lamb contributed, and as counsel to the organizations such as the legal tool of the communist party; this is a man who was accused of being a communist fellow traveller and this is the type of evidence that Russell Morton Brown had to overcome." (Emphasis supplied.)

Excerpt From Jury Instructions

* * * * * * * * * *

[1303] As already indicated, the law requires an acknowledgment or promise in writing to take the case out of the operation of the Statute of Limitations.

By an acknowledgment is meant some statement that is equivalent to a recognition of the debt as a debt due at that time. You are instructed that the acknowledgment contemplated by this law is one not accompanied by circumstances that negative an intention or promise to pay. If there be no express promise to pay, but a promise to pay is to be inferred from an acknowledgment of the alleged debtor, then such acknowledgment must contain an unqualified and direct admission of a previous existing debt which the alleged debtor is liable and willing to pay.

If there be accompanying circumstances which repel the inference of a promise or intention to pay, or if the expressions of the alleged debtor be doubtful, obscure, vague or indefinite, leading to no certain conclusions, but at least to only interferences which may affect different minds in different ways, then they are not to be deemed an acknowledgment or promise, so as to rescue the case from the [1304] bar of the Statute of Limitations.

In order to supply an inference of a promise to pay as a new or continuing debt, the circumstances of the acknowledgment must show a clear intention to pay the debt. The writing referred to must either contain an express promise to pay or be in terms from which an unqualified promise to pay is necessarily to be implied.

There is also a doctrine recognized by the law, which is known as the doctrine of estoppel. Sometimes the circumstances of a case are such that the doctrine of estoppel comes into play.

In other words, in a proper case, the debtor or defendant may be estopped or prevented from claiming the benefit of the bar of the Statute of Limitations.

Mr. Brown in this case is claiming that Mr. Lamb is estopped or prevented from availing himself of the bar of the Statute of Limitations. This is so, Mr. Brown claims, because he says that he—that is, Mr. Brown—was lulled into inaction. That is lulled into not filing this suit by words or conduct on the part of Mr. Lamb so as to permit the limitations prescribed by the Statute of [1305] Limitations to run against him.

On the other hand, Mr. Lamb and Dispatch deny that there was any activity or conduct on their part, or either of them, which lulled Mr. Brown into inaction.

In order that the principle of estoppel may operate, however, the plaintiff, Mr. Brown, must show to the jury by the evidence that Mr. Lamb did something that amounted to an affirmative inducement by him to Mr. Brown to delay bringing this suit, that this was done before the limitation period had expired, and that by such affirmative inducement Mr. Brown was lulled into a false security.

Now, the jury must search the evidence in this case to see whether it reflects the presence or absence of any such affirmative inducement offered to Mr. Brown by Mr. Lamb, and whether Mr. Brown acted on it to his prejudice, if there was such an affirmative inducement.

You may look to the correspondence between Mr. Brown and Mr. Lamb and you may consider whatever conversations you believe from the evidence took place between them, provided such conversations occurred between them prior to the expiration of the period of the Statute of [1306] Limitations.

* * * * * * * * * * *

[1307] Now, whether Mr. Lamb said what Mr. Brown says he said is a matter for the jury to decide. According to my recollection, Mr. Brown said that he had a conversation with Mr. Lamb in January 1959, that Mr. Brown said he was going to institute a suit in the District of Columbia, whereupon Mr. Lamb said that if Mr. Brown would withhold his action he, that is, Mr. Lamb, would get

straight with him—that is, with Mr. Brown, would work it out and be reasonable with him—that is, again, with Mr. Brown.

Now, at this time in January of 1959 the Statute of Limitations had about a year and a half to run.

If Mr. Lamb said what Mr. Brown says Mr. Lamb said, then did Mr. Brown rely on it? That is a question for you.

The undisputed evidence is that Mr. Brown filed suit in Ohio a few months after the alleged conversation of January 1959, apparently having concluded that Mr. Lamb [1308] had no intention of meeting his demands.

At the time Mr. Brown filed suit in Ohio he still had over a year left within the Statute of Limitations to file suit in the District of Columbia, if he so desired.

Even if the jury should believe that Mr. Lamb made an affirmative inducement to Mr. Brown in January 1959, still if the jury further believes it became apparent to Mr. Brown that he could not rely on it, and that thereafter Mr. Brown had ample opportunity to institute action in the District of Columbia prior to the running of the Statute of Limitations, then under those circumstances Mr. Brown may not excuse his failure to act on the ground of estoppel.

Mr. Brown also testified that he had a telephone conversation with Mr. Lamb in June of 1960. Mr. Brown said that Mr. Lamb said at that time that he was in the midst of several important business matters, that it was taking all the money he could raise, that he needed time and that he would get straight with him—that is, with Mr. Brown—and that if Mr. Brown would delay his law suit, and that if given time to get his affairs in shape, that they—that is, Mr. Brown and Mr. Lamb— [1309] would be able to settle very satisfactorily.

Concededly, Mr. Brown's services terminated in mid-June of 1957. The limitation period expired three years later in June 1960.

Should the jury conclude that the June 1960 conversation took place, the jury may consider it, provided the jury finds that Mr. Brown has proven that the conversation occurred prior to the expiration of the limitation period.

On his part, I believe Mr. Lamb testified that he had no conversation with Mr. Brown in 1960.

You are told that a mere request, if made, that there be a delay in filing a suit, does not call for the application of the Doctrine of Estoppel.

You are further told that neither would a willingness to discuss the claim or negotiate for adjustment, neither of these things would call for the application of the Estoppel Doctrine.

This doctrine, as I have endeavored to explain to you, has no application unless Mr. Brown proves by the greater weight of the evidence that a defendant offered [1310] him some affirmative inducement before the limitation period expired, which affirmative inducement lulled him into inaction and prejudiced him in some way.

When, as here, a person sues for compensation for services, and a suit was not brought within the limitation period, then that person has the burden of proving something that will take the case out of the Statute of Limitations, or something that will estop the defendant from setting up a defense of the Statute of Limitations according to the legal principles which I have endeavored to explain.

So, in this case, Mr. Brown, the plaintiff, has the burden of proving to the jury by a preponderance of the evidence, that is, by the greater weight of the evidence, that after the Statute of Limitations had run, and by a writing signed by him—that is, signed by Mr. Lamb—that Mr. Lamb either acknowledged the debt, as I have explained the term acknowledgment to you, or made a promise in writing to pay the debt as I have explained that term "promise" to you, or that Mr. Lamb, before the limitation period had expired, lulled Mr. Brown into inaction by an affirmative inducement offered to Mr. Brown to delay his bringing of

the suit, and that Mr. Brown relied on this [1311] affirmative inducement to his prejudice.

If the Jury should find Mr. Brown has failed to successfully carry his burden of proof as to the Statute of Limitations, then your verdict would be for the defendants. That would end the case and you would not need to consider anything further.

On the other hand, should you find that Mr. Brown has successfully carried his burden of proof in the respect last mentioned, then the Jury would proceed to consider the claim of Mr. Brown for services.

My suggestion to the Jury is that you first take up the question of whether the Statute of Limitations is applicable. As I have said to you, if the Statute of Limitations applies, it makes no difference whether the claim was originally well-founded or ill-founded, and you would return a verdict for the Defendants if you find that the Statute of Limitations is applicable.

On the contrary, if you find that the Statute of Limitations does not apply, or that a defendant is estopped from asserting it, then you would take up for consideration [1312] Mr. Brown's claim for services.

* * * * * * * * * *

Rule 50 Federal Rules of Civil Procedure

MOTION FOR A DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT

* * *

(b) *Motion for Judgment Notwithstanding the Verdict.* Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judg-

ment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

* * *

(Caption omitted)

Designation of Record

The cleark will please prepare a certified transcript of record for use on petition to the Supreme Court of the United States for writ of certiorari in the above-entitled cause, and include therein the following:

1. Joint appendix to briefs.
2. Opinion of July 17, 1969.
3. Judgment.
4. Appendix B to Appellant's brief, pages a4-a12 inclusive.
5. This designation.
6. Clerk's certificate.

RUSSELL MORTON BROWN
Russell Morton Brown, pro se

November 7, 1969

[Certificate of Service]

(Omitted)

SUPREME COURT, U. S.

FILED
DEC 15 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 860

RUSSELL MORTON BROWN, *Petitioner*,

v.

EDWARD OLIVER LAMB AND DISPATCH, INC., a Pennsylvania Corporation, *Respondents*.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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December 15, 1969

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATEMENT OF THE CASE

On June 18, 1957, the Petitioner rendered to the Respondents a bill for alleged services rendered as an attorney concerning a certain matter before the Federal Communications Commission (JA 48). From then,

until January 1959, Petitioner repeatedly wrote to Respondents requesting payment of his claim (JA 48-55; 88-101). On January 19, 1959, Petitioner personally discussed his claim with Respondent Lamb (JA 52, 53, 54, and 56). Thereafter, on April 28, 1959, Petitioner commenced a civil action in Lucas County, Ohio, claiming non-payment of the alleged attorney's fees (JA 76). Petitioner, to this day, has refused to move forward with this suit in Ohio. Finally, in May of 1963, six years after the origination of his claim, Petitioner started suit in the District of Columbia, the amount and the claim being identical to the suit in Ohio.

One of the defenses raised by Respondents was the local three year Statute of Limitations (JA 7, 11).

Upon trial of this case, a verdict was rendered in favor of Petitioner. Thereafter, upon motion, the trial court entered judgment *Non Obstente Veredicto,* in favor of Respondent and against the Petitioner, holding that Petitioner had not overcome the bar of the local Statute of Limitations and that Petitioner had so inflamed and prejudiced the jury against Respondents that the verdict was not based upon the evidence. In the alternative the Trial Court granted unto Respondents a new trial (App. 25a, JA 16). The Petitioner appealed to the Circuit Court of Appeals for the District of Columbia, upon the narrow issue of whether the Trial Court weighed the evidence wrongly for the purposes of Rule 50 of the Federal Rules of Civil Procedure. (App. 3a). The Appellant Court affirmed holding that the Trial Court had not erred (App. 1a, 2a, 3a, 4a). Petitioner now alleges that the Court of Appeals erred, not in its superbly written Opinion, but in footnote 4, a statement of dicta, was inconsistent with the Appellate Court's prior decisions.

REASONS FOR DENYING THE WRIT

The Court of Appeals' Opinion in Ruling Upon the Requirements of an Equitable Estoppel Which Would Bar Reliance Upon the Statute of Limitations, Is in Conformity With the Decisions of This Court and the Decisions of All the Circuit Courts of Appeal

The Petitioner comes before this Court urging that the Court of Appeals erroneously reviewed the trial record *de novo* and thus created a national issue of imperative public importance. Nothing could be further from the truth.

In the petition, Mr. Brown takes no issue with the Opinion of the Court of Appeals; however, as the disappointed litigant, he finds solace in the dicta of a footnote. Mr. Brown in his petition for a Writ of Certiorari, raises two questions. The first concerns a part of one sentence from the first paragraph of footnote 4 to the Opinion by the Court of Appeals and his second question comes from the second paragraph of that same footnote (414 F 2d 1210 at 1212 N. 4).

Petitioner's initial argument before this Court rests solely upon one part of a sentence lifted completely out of context from the dicta of a footnote. When the footnote is read in conjunction with the Opinion, there is no argument. Petitioner alleges the Court of Appeals, in order to affirm the Trial Court, reviewed the trial evidence *de novo*. This is not true.

> "This appeal is thus narrowly confined to the question of whether the trial court weighed the evidence wrongly for the purposes of Rule 50. Our close reading of the record does not warrant our saying that it did. We note in this regard that appellant's evidence was designed to show that appellant was lulled into inaction by the informal assurances of appellee Lamb which assertedly con-

tinued over a period of several years. But these alleged assurances and requests not to sue were not enough to keep appellant from bringing a suit for the fees in a state court of Ohio in April, 1959, a suit which is still pending. And it seems not unlikely that the three-year further delay in filing suit in the District of Columbia was induced less by Lamb's representations than by appellant's knowledge as a lawyer that he had a precautionary anchor to windward in the form of the Ohio suit. We do not think the District Court erred in concluding that the evidence fell short of showing the element of reliance to the degree required by the doctrine of equitable estoppel.[4]

Affirmed.

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[4] Even if it be assumed that the trial court changed its mind about the propriety of its having submitted the estoppel issue to the jury, and granted the motion n.o.v. solely because it eventually embraced the position that § 3504 left no room for the operation of equitable estoppel based on unwritten evidence, the judgment dismissing the complaint should still stand. Such a reading of the statute would be incompatible with the spirit of our prior expressions on this subject, *see* n. 3 *supra,* and with the more persuasive authorities. *See* Albachten v. Bradley, 212 Minn. 359, 3 N.W. 2d 783 (1942). "Among all the spheres of its activity estoppel probably plays no more useful service than the alleviation of hardship caused by statutes of limitation." Dawson, *Estoppel & Statutes of Limitation,* 34 MICH. L. REV. 1 (1935). In the unlikely event that the learned trial court failed to consider the evidence in relation to the estoppel claim because of an erroneous interpretation of § 3504, our own review of the evidence for this purpose establishes its inadequacy to impose an estoppel. No person, especially a lawyer such as appellant here, could reasonably rely on the representations allegedly made by or on behalf of appellees."

Clearly then, the Court of Appeals' Opinion ruled upon the narrow issue of equitable estoppel, and held that the Trial Court had not erred. The footnote merely shows that the arguments, raised by Petitioner on appeal, had no merit.

Petitioner also argues the merits of equitable estoppel as ruled upon by the two courts below:

The Trial Court, upon motion by the Respondents, ordered a Judgment *Non Obstente Veredicto,* in favor of the Respondents, and against the Petitioner. In its order, the Trial Court held:

> ". . . and it appearing to the Court that the Statute of Limitations had run prior to the filing of this action[1], that no evidence was adduced at the trial of a character requisite for taking this action out of the Statute of Limitations,[2] and hence that the motion for Judgment N.O.V. should be granted; . . ." (App. 25a, JA 16, 17) (footnotes omitted)

On appeal, the Petitioner argued, in spite of the language of the lower court's Opinion, that the lower court ignored the question of equitable estoppel. Plainly, the lower court considered the doctrine of equitable estoppel, as why else would its Opinion state "no evidence was adduced at the trial of a character requisite for taking this action out of the Statute of Limitations." (Supra).

On appeal, the Circuit Court of Appeals, also considered this doctrine:

> "We do not think the District Court erred in concluding that the evidence fell short of showing the element of reliance to the degree required by the doctrine of equitable estoppel." (414 F 2d 1210 at 1212).

As to the merits of equitable estoppel, the only evidence presented shows that 22 months after Petitioner rendered a bill for alleged services, he started suit in Ohio (JA 76, 88). Thereafter, 14 more months went by while the parties discussed settlement before the

District of Columbia Statute of Limitations ran (JA 52, 53; 88-101). Finally, three more years passed before Petitioner started suit in the District of Columbia (JA 3, 4, 5). Naturally, Petitioner raised the local Statute of Limitations (JA 7, 11), which in explicit language provides:

> "In an action upon a simple contract, an acknowledgement or promise by words only is not sufficient evidence of a new or continuing contract whereby to take the case out of the operation of the Statute of Limitations or to deprive a party of the benefit thereof *unless the ackowledgement or promise is in writing, signed by the party chargeable thereby.*" (1967 D.C. Code Sec. 28-3504) (Emphasis supplied)

Petitioner has never claimed there was any such writing and, in fact, there is none. However, Petitioner, in an attempt to save his case, claimed the doctrine of equitable estoppel prevented Respondents from raising the Statute of Limitations.

The wording of the Statute of Limitations is clear and precise and exactly on point with the issue here raised. The Statute ran, there was no writing, and, therefore, Petitioner's claim was impotent. It is also clear that the history of the Statute of Limitations carried with it the doctrine of equitable estoppel. That is to say, the Statute of Limitations shall govern, unless there has been some fraud, accident, or mistake that would make it unconscionable to allow the Statute to prevail. Here there was no mistake. Petitioner, an able and admittedly august attorney, certainly cannot claim he did not know of such a statute (JA 32, 39). There was no mistake, as Petitioner had already started suit in Ohio. As the Appellate Court so colorfully

stated, "He (Mr. Brown) had a precautionary anchor to windward in the form of the Ohio suit." (414 F 2d 1210 at 1212). Certainly it is plainly clear that there was no fraud.

In the absence of fraud or some unusual circumstance, the Courts have uniformly held that a writing is required acknowledging the indebtedness in order to stay the running of the Statute. *Hornblower* v. *George Washington University,* 31 App. D.C. 64, 75 (1908); *Howard University* v. *Cassell,* 75 App. D.C. 75, 81, 126 Fed(2d) 6 (1941); *McCloskey* v. *Dickanson,* 56 Atl. (2d), 442, 76 W.L.R. 146 (1947); *Fontar* v. *Aetna Casualty and Surety Company,* 124 U.S. App. D.C. 168, 363 Fed (2d) 297 (1966).

If in fact the type of discussion had by the parties (JA 88-101) were sufficient to take the case out of the Statute of Limitations, then surely, the Statute of Limitations would be completely emasculated. Therefore, the two courts below should be sustained and the Writ denied.

In Holding That Burnett v. New York Central Ry. Co., 380 U.S. 424, 428 (1965) Was Not Applicable to This Case, the Court of Appeals Is Not in Any Conflict With Any Other Jurisdiction

Petitioner argues in his petition that the Court of Appeals erred in not applying the Doctrine set out in *Burnett* v. *New York Central Ry. Co.,* 380 U.S. 424, 428 (1965), because it is an F.E.L.A. case (See Petitioner's Brief p. 17). Petitioner bases his argument upon the second paragraph of footnote 4 of the Opinion of the Court of Appeals:

> "We have also considered and find without merit the appellant's contention that the judgment n.o.v. should be reversed on the ground that the D.C. statute of limitations was tolled by the filing

> of the suit in Ohio. Burnett v. New York Central R.R. Co., 380 U.S. 424 (1965) is inapposite because (1) this is not an FELA case; (2) the Ohio suit filed by appellant was not dismissed on grounds of improper venue; and (3) appellant filed his D.C. suit more than three years after he filed in Ohio—in *Burnett* the plaintiff filed within eight days of the dismissal of the Ohio suit." (414 F. 2d 1210 at 1212 n. 4.)

For some reason, Petitioner ignores the other reasons given by the Court of Appeals.

As Petitioner said in his petition (See Petitioner's Brief, page 18):

> "This court held that following dismissal of the state court action, *a prompt refiling* in the Federal court was not barred by limitations, though the actual period named in the Statutes had run." (Emphasis Supplied)

Petitioner did not file promptly. Petitioner filed his claim in the District of Columbia six years after his claim matured and 34 months after the local Statute of Limitations had run, certainly this was not prompt. Further, the suit in Ohio was not dismissed, it was lying dormant because Petitioner refused to move forward. There was no defect in the Ohio suit, it was a proper forum; however, Petitioner preferred not to litigate his claim in Ohio. Therefore, should Petitioner be able to claim his plight is akin to the situation in *Burnett* v. *New York Central Ry. Co.* (Supra)? Since Petitioner's predicament has been caused by himself, it is suggested that *Burnett* v. *New York Central Ry. Co.* has no application.

Finally, it is abundantly clear that Petitioner exaggerates when he interprets the Opinion of the Court of

Appeals. When the Court said this is not an F.E.L.A. case, they were giving but one of three reasons why *Burnett* v. *New York Central Ry Co.* was not relevant nor applicable to the case at hand.

Respondents are frank to admit that, in certain cases, the Statute of Limitations should be tolled where suit has been started in a State Court and very promptly thereafter is re-initiated in Federal Court, even though the Statute of Limitations has run in the Federal suit. However, this should not be the case where a plaintiff initiates suit in a jurisdiction where service can be made, and then sits back waiting for almost 4 years until the unwary defendant happens to physically come into a jurisdiction more to the liking of the plaintiff. Certainly, the Statute of Limitations has a function to prevent stale claims, and to have contested matters litigated while the evidence is at hand. It just as certainly was not intended to aid a plaintiff who is reluctant to try a claim in one court until he can obtain service of process in what appears to be a more favorable tribunal.

The Right of Trial by Jury Has Not Been Encroached Upon

Petitioner asks this Court to reverse the Trial Court because Petitioner alleges that the function of the jury was encroached upon. (See Petitioner's Brief, pages 5 and 6). Respondents suggest that the Trial Court acted properly when, after granting Judgment N.O.V., it gave Respondents, in the alternative, a new trial (JA 16, 17). The reason as stated in the Opinion, for the new trial was the conduct of Petitioner in trying his case. Petitioner did not try the issue of whether or not a fee was due to him, but instead tried the issue of whether or not his former client was a communist. This

unwarranted behavior by Petitioner, certainly, at the very least, should entitle Respondents to a new trial.

CONCLUSION

There has been shown no conflict with any Statute or applicable principle of law. There has been shown no issue of imperative national importance. There has only been shown a strained and unnatural interpretation of the Opinion of the two lower courts. For these reasons and those above argued, the Petitioner should be denied his Writ of Certiorari. Respondents so pray the Court in the case at bar.

Respectfully,

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